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No. 82-1986

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WASHINGTON COUNTY HOSPITAL ASSOCIATION, INC.,

Petitioner,

v.

BERTHA MORRISON AS ADMINISTRATRIX
OF THE ESTATE OF SYLVESTER MORRISON, Jr.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this case, in a factually disputed posture, present reasons supporting a review on writ of certiorari pursuant to Rule 17 of this Court?

2. Is it possible for a county hospital cooperating with a sheriff, doctor and other state officials to abridge a patient's constitutional rights?

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Note on Form of Citation

As used herein "A.___" refers to the Appendix to the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

The respondent adopts as its statement of the case for purposes of this brief the Factual Background contained in the opinion of the United States Court of Appeals for the Eleventh Circuit found at pp.2a through 4a of Petitioner's Appendix with only three additional points.

First, the district court, per Hon.W.Brevard Hand, granted summary judgment in favor of the hospital on both the federal claims and the state wrongful claims. The district court found, pursuant to Fed.R.Civ.P. 56, that there was no material dispute of fact. The Court of Appeals reversed and remanded for further proceeding. The Court of Appeals found that there was a material dispute of fact.

Second, from the beginning of this litigation, there has never been any dispute but that the actions of the Washington County Hospital Association, Inc., were "under color of state law." The petitioner acknowledges at p.6 of its brief that the hospital is supported by tax revenues. Additionally, this same legislative scheme provides that the Board of Directors of the hospital is appointed by the Washington County Commission. One member of the Board of Directors is appointed from each of the seventeen voting precincts within the county. The hospital is organized pursuant to state statute (Act No.211, 1945 Regular Session) like many other county hospitals in the state of Alabama. It is a government hospital.

Third, admission to the medical staff of the hospital is only by approval of the Board of Directors of the hospital. Doctors on the medical staff must be reapproved each year by the Board of Directors. Admission to the medical staff of the hospital carries various rights, duties, and responsibilities; including the duty of the physician to

follow the rules and regulations promulgated by the Board of Directors of the hospital.

REASONS FOR DENYING THE PETITION

I. DOES THIS CASE, IN A FACTUALLY DISPUTED POSTURE, PRESENT REASONS SUPPORTING A REVIEW ON WRIT OF CERTIORARI PURSUANT TO RULE 17 OF THIS COURT?

This case is before this Court after rulings on summary judgment by the trial court. The Court of Appeals reversed and found that there were material disputes of fact. There is a substantial factually disputed record before this Court. In this factually conflicting posture this case is not appropriate for review by writ of certiorari. The government hospital must concede that all facts in the record ought to be construed most favorable to the respondent. Adikes v. S.H.Kress & Co., 398 U.S.144 (1970); Bishop v. Wood, 426 U.S.341 (1976).

In such a circumstance, the government hospital is forced to contend that regardless of what action it takes, a government hospital cannot violate constitutional rights of its patients, even if it participates in their illegal arrest and incarceration, discharges a mentally incompetent person suffering from a life-threatening illness into a medically unsupervised environment, and denies a 39-year black male garbage man even the most rudimentary levels of nursing care. (See footnote 1 of Court of Appeals' opinion.)

Nowhere in the brief does the petitioner allege that the Court of Appeals' opinion is in conflict with another federal Court of Appeals or a state court of last resort. Rule 17(a). This case does not present a question from a state court of last resort deciding a federal question. Rule 17(b). The petitioner's brief does not even contend that

this case presents "an important question of federal law which has not been, but should be, settled by this Court." Rule 17(c).

Arguably, only at the conclusion (Petitioner's brief, p.21) does the petitioner approach the standards of Rule 17. There the petitioner summarily contends that the Court of Appeals' ruling is in conflict with three opinions of this Court; Blum v. Yaretsky, ___U.S.___, (1982); Aldinger v. Howard, 427 U.S.1, (1976); Monell v. Department of Social Services, 436 U.S.658 (1978).

First, the argument concerning Aldinger v. Howard is easily disposed of. Nowhere in the entire opinion of the Court of Appeals is the case of Aldinger v. Howard even referred to. The matter was never brought before the Court of Appeals. It was the district court which issued an order (A.31a) which relied upon Aldinger v. Howard. The petitioner seeks to have this Court review the order of the United States District Court for the Southern District of Alabama. Petitioner never appealed or cross appealed from the decision of the United States District Court. Issues concerning Aldinger v. Howard were never presented to the Court of Appeals. That is the reason that the Court of Appeals' opinion does not even address this issue.

Second, the petitioner's concern about Monell is misplaced because, again, the Court of Appeals did not base its decision upon a Monell analysis. The Court of Appeals cited Monell only one time concerning the Hospital's liability and that was only to explain what the district court held. (A.5a.) The Court of Appeals did not rely upon Monell to determine a case of action against this government hospital, and hence the Court of Appeals' decision cannot be in conflict with this Court's opinion in Monell.

The Court of Appeals' decision concerning the hospital

does consider Blum v. Yaretsky (A.5a). The Court of Appeals considered and distinguished Blum from the facts in the present case.

> Morrison's discharge was not purely a medical judgment made by a private party according to professional standards. See Blum v. Yaretsky ... rather, the decision to discharge appears to have been based on administrative considerations (e.g., lack of facilities, inadequate supervision) for which the hospital cannot disavow responsibility. Based on these considerations the hospital, acting in concert with Dr. Petcher, arranged for Morrison to be placed in the custody of county police. Hospital staff telephoned the sheriff's office and participated in the discharge. While the hospital staff may have performed under the direction of the Dr. Petcher, under the circumstances, such is not sufficient to exonerate the hospital as a matter of law. (Emphasis in original.)

(A.5a-6a.) Petitioner was apparently so unimpressed with the holding of Blum v. Yaretsky that it never cited or relied upon that case in the Court of Appeals. The Court of Appeals carefully analyzed Blum which dealt with the liability of a nursing home for the acts of its physician and found major differences in this case.

The further fact that the other defendants in this case, Washington County, Alabama; the county commissioners; the doctor; and, the sheriff have not sought review in this Court may well lead to less than a full presentation of the facts and issues in this case. The piecemeal and confusing procedural history below (A.4a) had various parties first in, then out, and then again in the litigation with some claims in and some claims out. The sequence of events which led to the tragic death of Sylvester Morrison are so closely related in time and among the actors that the absence of any one

defendant makes a ready opportunity for the others to blame the missing defendant. None of the defendants in this case have chosen to assert any cross claim.

II. IS IT POSSIBLE FOR A COUNTY HOSPITAL COOPERATING WITH A SHERIFF, DOCTOR AND OTHER STATE OFFICIALS TO ABRIDGE A PATIENT'S CONSTITUTIONAL RIGHTS?

The Washington County Alabama Hospital was acting under color of state law in precisely the same sense that the medical units in the Texas and Florida prison systems are acting under color of state law; Estelle v. Gamble, 429 U.S.97 (1976); Donaldson v. O'Connor, 422 U.S.563 (1975). The Washington County Hospital, with its politically appointed Board of Directors and legislatively mandated receipt of property tax revenues, is as much, or more of a state actor than the Wilmington Parking Authority. Burton v. Wilmington Parking Authority, 365 U.S.715 (1961). Because of the presumption that attaches to the facts of a non-movant for summary judgment, the petitioner here must contend that it legally cannot violate a patient's constitutional rights. It is simply incorrect to make such an assertion.

This case shows at least the following direct involvement by the hospital with the treatment of Sylvester Morrison. Hospital staff called the sheriff and sedated Mr.Morrison, placed Mr.Morrison in a wheelchair and rolled him out of the door into an awaiting police car. No hospital staff member questioned the decision to discharge Mr.Morrison and no member of the staff checked to see if there was adequate follow-up care and medication after discharge. Proper nursing care requires such action. The hospital refused to make adequate nursing staff available and the staff did not carry out medical instructions to give

Mr.Morrison sufficient sedatives. A government-run hospital which provides facilities, nursing and custodial staff and medical staff cannot hide from its responsibility merely because a private physician, who the hospital had approved and reapproved each year, gave some medically incorrect instructions. The health care team today is composed of variously trained professionals who each are required to exercise their best professional judgment and training. A nurse can no more blindly give a lethal injection of a drug on the orders of a doctor than she should watch a seriously ill patient become discharged from a hospital to a medically unsupervised environment. As the Court of Appeals noted

> Whether the hospital staff should have subsequently questioned, acquiesced or participated in the turning over of a patient to law enforcement authorities is a question of fact. We cannot agree that the hospital merely operates as a slavish handmaiden to the whims of physicians on its staff it claims it has no responsibility for.

(A.7a.)

As the Court of Appeals correctly analyzed (A.5a-6a), this case against the hospital does not rest entirely on a "medical judgment made by a private party according to professional standards." Nevertheless, the Court of Appeals for the Fifth Circuit has held for many years that similar county hospitals operating in Alabama involved state action when they delegated their decisions for deciding which physicians would be admitted to the medical staff composed of private physicians. Woodberry v. McKinnon, 47 F.2d 839 (5th Cir.1971) (Barber County, Alabama); Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir.1968) (Mobile County). The state can no more delegate authority for conducting

elections to private clubs and escape responsibility for their actions than could a state hospital delegate its hiring or medical decisions to so called "private parties." E.g., Smith v. Allwright, 321 U.S.649 (1944).

The Court of Appeals carefully considered Blum v. Yaretsky, supra, and distinguished it. The "administrative considerations" of the hospital and the concert of action between the hospital staff and the doctor and the sheriff place the hospital well within this cooperative effort (A.6a). The Defendant Hospital has never contested and does not now contest that when the hospital acts it does so "under color of state law." The government hospital contends that it cannot be liable for the actions and decisions of the doctor or, presumably the nursing staff and administration.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted this 15th day of June, 1983.

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I do hereby certify that on this June 15, 1983, I served a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO

WRIT OF CERTIORARI upon counsel of record: Mack B. Binion, Esq., Lyons, Pipes and Cook, P. O. Box 2727, Mobile, Alabama 36601, by depositing same in the United States mail, postage prepaid, or by hand.

ATTORNEY FOR RESPONDENT

MOTION FILED

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RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Bertha Morrison, pursuant to the provisions of Rule 46 of this Court and 28 U.S.C. §1915, moves this Court to allow her to proceed in this case in forma pauperis. In support thereof the respondent shows this Honorable Court that she is without sufficient funds and resources to pay for the printing cost and other fees required of a respondent in this Court, and her limited part-time income is the sole support for her and seven children and grandchildren, as detailed in the accompanying affidavit.

Respectfully submitted this 15 day of June, 1983.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 15th day of June, 1983, a copy of the foregoing RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS was served upon counsel of record: Mack B. Binion, Esq., Lyons, Pipes & Cook, P. O. Drawer 2727, Mobile, Alabama 36652, by depositing same in the United States mail, postage prepaid.

ATTORNEY FOR RESPONDENT

No. 82-1986

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Bertha Morrison, as administratrix of the Estate of Sylvester Morrison, Jr., being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed, without being required to prepay fees, costs or give security therefor, or file the forty copies of briefs required by the rules of this Court, I state that because of my poverty, I am unable to pay the cost of said proceeding or to give security therefor and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

A: Yes.

I am employed as a part-time school bus driver by the local system. This employment lasts ten months of the year for which I am paid $390 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self employment, or in the form of rent payments, interest, dividends or other source?

A: No.

3. Do you own any cash or checking or savings account?

A: Yes, I have a bank account whose total value is not more than $10.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothings)?

A: Yes, I own a home which was purchased in 1970, and has an approximate value today of $20,000 to $25,000. The outstanding balance on the mortgage on the home is in excess of $9,000. I own a 1978 Buick which is valued at approximately $4,000.00. I owe approximately $4,000.00 on the car. My total monthly house payment is $88.00 and my total monthly car payment is $237.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A: I am the sole income earner for five children and two grandchildren. They all live in the home with me and their names and ages are as follows: Jerri (26), Aubrey (22), Lisa (19), Darla (17), Sylvester, Jr. (16), and the two grandchildren: Dregrit (10) and Brandon (2).

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Bertha Morrison

BERTHA MORRISON

Subscribed and sworn to
before me on this 13th day
of June, 1983.

Betty H. Pendleton
NOTARY PUBLIC

My Commission Expires 11-8-83